

CASE STUDY ON LAND IN BURMA



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Report Summary

This case study has been produced in response to a request made to the Evidence on Demand Helpdesk. The objective of the request was to write a detailed case study on land tenure reform in a fragile and post-conflict state, Burma, and provide the reader with an understanding of how land tenure reform can work under the country's particular social, political and economic conditions.

Burma is a fragile state undergoing a period of profound economic and political reform following a period of conflict and isolation. As the poorest country in South Asia, land is the main asset for many people, especially in rural areas where most of Burma's population lives. However, most farmers have weak tenure security, and in the recent past have been exposed to land expropriation by the Burmese army and the other state institutions of a military dictatorship. Additionally, in conflict-affected border states, the strategy of government forces and non-state armed groups to finance military operations by leasing land to investors has led to land grabbing on both sides.

The recent political changes that have put the country back on the road to civilian rule have profound implications for security of land tenure. Land legislation passed in 2012 is meant to strengthen the formal land administration and provide more rights for landholders, including the right to lease and sell land. It also introduces a system for issuing land use certificates, which the government plans to roll out swiftly over the next few years. At the same time, the government's policy to open up to foreign investment for large-scale agriculture, mining and industrial zones threatens to place further pressure on access to land. How recent *legal reforms* translate into *land tenure reform*, i.e. into changes in the terms and conditions of how land is held and transacted, remains to be seen and depends on whether state institutions desist from, and prevent, further expropriation, and whether the new Farmland Management Boards that administer land at the local level function effectively. Commentators warn that weaknesses in the legal framework potentially disadvantage farmer's tenure security in the face of powerful state-backed interests; however, evidence suggesting if these fears are confirmed is unavailable. This case study discusses the content of these legal reforms in the context of Burmese politics, noting how some of the changes intended in the laws may have an impact on the tenure security of landholders.

Donors can support improved land administration by increasing dialogue on land issues with political leaders, by funding technical expertise to assist land administration functions and land governance processes, and by highlighting learning experiences from other countries with similar characteristics. They can help rural landholders to improve their security of tenure by funding civil society groups to carry out research and awareness-raising campaigns among landholders, by providing direct training to farmers to better negotiate land sales or leases, and by funding activities that raise the awareness of private sector entities on how to avoid poor practices associated with leasing land.

Note: Burma is also called the Republic of the Union of Myanmar which is the official name chosen by the military government in 1989. This case study refers to the country as Burma, the name used by the UK Government.



SECTION 1

Background to Burma's political, economic and land sector

Burma's political history


The current political context in Burma is largely shaped by ongoing national political and democratic reform processes, and by ceasefire negotiations with ethnic groups, aimed at ending armed conflict which has perpetuated civil war in border states over the last few decades. The parliamentary elections in 2012, which saw the opposition National League for Democracy (NLD) party win 43 of the 44 seats it contested, provided cautious optimism that the gradual political reform process was moving in the right direction. As well as increasing the presence of pro-democracy opposition and ethnic parties in the parliament, holding elections were a key condition for rolling back sanctions which had prevented western companies from doing business in Burma.

Ongoing talks between the government and the National Ceasefire Coordination Team, a group of 16 armed ethnic rebel groups, aimed at reaching a national ceasefire, appear on track in early 2014. These talks are targeted at achieving a political settlement between the national government and ethnic groups, and at complementing bilateral talks between the government and leaders of each ethnic group (The Irrawaddy, 2014).

At the heart of these talks lie the demands for greater federalism; these have been a central political issue since before independence from British rule. By creating a separate colony from what was a province of British India, the British brought together 130 ethnic groups into a single administrative entity that gained independence as the Union of Burma in 1948. Although multiple parties, some with strong ethnic minority participation, participated in politics in independent Burma, support for a political union was weak as ethnic groups pushed for greater autonomy. Demands for self-rule in the late 1950s led to longstanding armed conflict by separatist groups in Shan state; this then spread to other areas, including Kachin (see map in Annex 2). Political struggles between competing left-wing factions for control of central government ended with a coup d'état in 1962, which created a socialist state under the rule of a military council, the Union Revolutionary Council (URC).

Over the next 26 years, the military-backed Burma Socialist Programme Party nationalised key economic sectors, including 15,000 companies. It pursued an isolationist policy, banning western companies and aid organisations. An economic crisis in the 1980s led to widening protests, which culminated in the countrywide 1988 demonstrations by student groups and political parties. The military responded violently to the protests and imposed martial law. Although the National League for Democracy won the 1990 elections, military leaders refused to relinquish power and arrested Aung San Suu Kyi, one of the two leaders of the party.¹ Attempts to negotiate a new constitution during the 1990s failed, resulting in political confrontation. A surge of protests in 2007 was prompted by the removal of fuel subsidies and deteriorating economic conditions; this 'Saffron Revolution' led the military regime to draft and announce a new Constitution in 2008. Parliamentary elections in 2010 – boycotted

¹ The second party leader was General Tin Oo.



by the NLD and other parties – saw a victory for the military-backed Union Solidarity and Development Party in parliament.

Since the inauguration of the reformist president Thein Sein in 2011, the government has set out a number of key reforms across government policy and law, which included holding the aforementioned 2012 parliamentary elections. Implementing these reforms is critical for Burma to normalise relations with the US and the EU and to access additional financial support from foreign assistance programmes. However, concerns surround the pace and depth of reforms, especially the reduction of human rights violations connected to prisoners of conscience and the government’s lack of action in protecting the Rohingya community in Rakhine State from sectarian attacks (DVB, 2014).

Amending the 2008 Constitution and contesting in parliamentary elections in 2015 are priorities for opposition parties. The automatic allocation of 25% of parliamentary seats to the military enshrined in the constitution is seen to be incompatible with the shift of power towards broader political representation; therefore, constitutional reform is high on the agenda of opposition parties. Reforming the land sector and regulating foreign investment in land have also become major political issues.²

Economy

Despite its rich deposits of gas and minerals, poor economic policies and international sanctions have stalled Burma’s economic development; the country is one of the poorest in Southeast Asia, with GDP of US\$50.62 billion in 2011 (WDI, 2011). Roughly one quarter of the national population falls below the national poverty line (IHLCA, 2011).³ Selling natural resources was a key source of income for the military regime during sanctions; in the 1990s, the government earned much of its foreign income from logging, especially in areas on the Chinese and Thai borders, including Kachin State, Shan State, Karenni State, Karen State and Tanintharyi Division. Logging and the sale of precious stones are also important sources of revenue for non-state armed groups (BEWG, 2011).

Although services account for 42% of GDP, agriculture remains a major economic sector that contributes 40% of GDP and employs 66% of the population. Besides the sale of natural gas, key exports include timber and agricultural products such as pulses, beans and rice. The government has identified the agricultural sector as an important pillar of Burma’s growth strategy, and aims to increase the cultivation of key export products, including oil palm, cassava and sugar palm. This strategy involves transferring land to companies trusted by or affiliated with the military regime.


Population

Burma’s population is estimated to be approximately 54 million people. Burmans, the largest ethnic group, account for 68%.⁴ Other major ethnic groups include the Shan (9%), Karen

² All major political players have introduced changes affecting land governance in what can be seen as attempts to increase political power (Kerr, *personal communication*). Reformist president U Thein Sein introduced new land laws (see Section 2), but debate on these was ruled out by the Speaker of the Lower House, a senior member of the previous military regime. At the same time, opposition leader Aung San Suu Kyi gained agreement for a parliamentary committee to probe previous land confiscations.

³ Equivalent to US\$1.03 per person per day.

⁴ Socio-economic data for Burma is poor and unreliable: the most recent comprehensive population census is 30 years old. A 2007 UN report stated that Burma had the least capacity of ASEAN countries to produce reliable data; this view has been confirmed by researchers in



(7%), Rakhine (4%), Chinese (3%), Indian (2%) and Mon (2%). Burmans are the major ethnic group in 40% of Burma, with other ethnic groups concentrated in northern and eastern border states (Chao, 2013). The overall population growth rate is estimated at 2% per year. Population density for the whole country is 73 people per square kilometre, and is higher in the central and coastal regions, especially the Irrawaddy delta (see map in Annex 2).

Land and natural resources

Burma has a land area of 676,578 square kilometres, with roughly three agro-ecological zones: uplands, dry zone and the Irrawaddy delta. 50% of its land area is covered by forests, although logging has caused widespread deforestation over the last 20 years. 19% of land is used for agriculture, a quarter of which is irrigated (WDI, 2012). The physical and ethnic geography of the country is highly variegated, leading to distinctive land-use practices between regions. The Irrawaddy delta is home to 60% of rice production; most families are involved in commercial rice production and coastal and mangrove fishing. Vegetable and livestock production are common in the central dry zone but crop failures, resulting from recurring poor rains, have led to high rates of urban migration (BEWG, 2013). Most of the eastern, northern and western states of Kachin, Karrenni, Karen and Chin, as well as parts of Shan, Mon and Arakan, are hilly; main land uses include irrigated rice cultivation in valley floors and rotational farming (*taungya*) on hillsides. Large plantations have also been established in some of these areas.

Land holdings, distribution and transfer

Land distribution

The average size of land holdings across the country is 2.7 hectares (has), which is moderate compared to other Southeast Asian countries (ILHS, 2011).⁵ In line with the differences in population density, land holdings vary across the country: households' land holdings are largest in Irrawaddy State (4.5 has) and Yangon (3.8 has), and smallest in Chin Shan (0.7 has on average).

Land ownership differs by household wealth. ILHCA data show that poor households⁶ have an average of 1.75 has, compared to 2.95 has for non-poor households. Average land holding for the whole country has been stable or gained slightly from 2005-2011 (ibid). Land distribution is more skewed in some parts of the country than others: in richer states with larger average land holdings such as Yangon, Awerwaddy and Bago, land holdings of the non-poor are 40% larger than those of poor households. In poorer states, including Rakhine, Chin and South Shan, the differences are much smaller – the land holdings of the poor are less than 10% smaller than the non-poor (ibid).


Landlessness is also a significant phenomenon in Burma's countryside. Although data from national and local surveys present contrasting pictures of the scale and trends of landlessness,⁷ 25-50% of the population in rural areas is estimated to be landless (USAID, 2013; MSU & MDRI, 2013). Poor people are more likely to be landless, many of whom are employed as agricultural labourers. (ILHCA, 2011) The high and growing debt burden

subsequent reports (Ash Center, 2011; MSU, 2013). Therefore, figures in this report should be interpreted with caution.

⁵ As mentioned previously, recent and reliable statistics on land holdings and agricultural practices are not available.

⁶ Defined as the second quartile (25-50%) of the population using food consumption measurements.

⁷ This is partly because migrants are counted differently (Ash Center, 2011).



among farmers is an important reason for shrinking plot sizes, distress sales and landlessness in some areas (Ash Center, 2011). The Delta area, Bago State and Mandalay in central Burma have the highest rates of landlessness; Rakhine State also has a large landless population; this includes the Muslim Rohingya community which has faced increasing levels of land dispossession as a result of ethnic tension (ibid; MSU & MDRI, 2013). Land acquisition by the military and government has also been an important driver of dispossession and landlessness (BEWG, 2011).

Land acquisition

While recent years have seen growing numbers of reports on land grabs in relation to large-scale strategic projects, the majority of these grabs go back several decades; recent years have seen a decline in incidents (DFID & FCO, 2013). Precise numbers on the frequency and scale of land grabs are difficult to pinpoint because official sources cite different figures.⁸ However, official reports and complaints sent to human rights organisations and political committees provide an indication of the scale of land confiscation and evictions:

- The majority of the 1,700 complaints that the National Human Rights Commission received in its first six months of operation were related to land grabs;
- A commission on agriculture formed in 2012 by the National Democratic Force, a political party, received 4,000 complaints regarding land grabs and dispossession in the first few months of investigation;
- The cross-party Land Acquisition Investigation Committee has received more than 2,000 complaints about land grabs and dispossession since 2012.

Available evidence suggests that land has been acquired mainly by the former military government, principally for Burmese business interests (ibid). In conflict areas, the seizure of land by armed forces is common.


Land acquired for military purposes

In border states, the military has expropriated land for military bases and training. Here and elsewhere the military confiscated land to grow cash crops to raise revenue or to grow food for army rations (Chao, 2013; AAYSC et al, 2009; BEWG, 2011). For example, reports from Mon State highlight widespread expropriation of existing betel nut and rubber farms as the military moved across the state between 2001 and 2007 (AAYSC et al, 2009). These expropriations have typically happened without any payment of compensation to farmers; local populations have often been forced to provide free labour, or pay rent and fines for continued use of the land.

Land acquired by the government for investment purposes

Growth of the agribusiness sector has been heavily promoted in agricultural policy. The 30-year Master Plan for the Agriculture Sector launched in 2000 aimed to convert 4 million ha of what is defined as wasteland into productive land under private agribusiness (Chao, 2013). Certain parts of the country have been identified for investment: half of the total area allocated for new investment nationally is for oil palm development in Tamintharyi Division near the Thai border, and large concessions have been given to companies in Kachin and South Shan (BEWG, 2011).

⁸ For instance, the Ministry of Agriculture recently acknowledged 745 cases of land rights abuses, while the Parliamentary Land Investigatory Committee cites over 6,000 complaints (The Irrawaddy, 2014).



Besides military and government officials, the main beneficiaries of confiscations are Burmese agribusinesses and, to a lesser extent, foreign companies. Burmese agribusinesses with close affiliations to the regime are given considerable opportunities to access land at low or no cost and encouraged to develop plantations for exporting agriculture products (especially sugar cane and oil palm), on top of receiving generous state funding to complement an unsuccessful export quota programme.⁹ According to official figures, by March 2012 1.38 million has of virgin and fallow land have been acquired by the Ministry of Agriculture and granted to 390 companies and government organisations (MoAI, 2012).¹⁰ In August 2013, the government announced that 6,400 companies had been granted land concessions, totalling 1.6 million has (Myanmar Times, 2013).¹¹

However, land confiscated and designated for large-scale farming operations is often not put to use. In 2013, the Ministry of Agriculture and Irrigation released figures stating that less than one quarter of land concessions had been developed (The Irrawaddy, 2013). There is also anecdotal evidence that the speed and scale of land acquisitions (at least by the army and businesses) has slowed considerably in the last year, following efforts by senior political officials to clamp down on land grabs. The Land Acquisition Scrutinising Committee (see Section 2, page 11) is one such effort (Obendorf, 2012; Landesa, 2013).

Although formal foreign management of land concessions is rare, several large concessions in Kachin and Shan are under *de facto* Chinese management. These concessions were set up by both Burmese regional military commanders and opposition forces in areas under their control. China's policy of providing grants for agribusinesses to develop alternative economic activity to opium cultivation played an important role in financing the expansion of Chinese companies into these areas (BEWG, 2011). Major investors from Thailand, Vietnam and Malaysia are also thought to have completed or be in the process of acquiring large plantations for cash crop production (Chao, 2013).

Although reports on land acquisitions state that private land transactions are common, these are not well documented because they were illegal before the introduction of new legislation in 2012 (BEWG, 2011).

Box 1 How is Burma different to other countries in Southeast Asia?

Burma shares some characteristics with its Southeast Asian neighbours. Cambodia, Laos, Vietnam, Thailand and Bangladesh have a similar climate and geography and are also home to multi-ethnic populations. The former three have also been under authoritarian socialist and military rulers in recent history. However, Burma faces issues that stand it apart from other countries, including:

- Economic sanctions on Burma prevented western investment and trade for most of the last 20 years. Although modest inward investment from Asian countries in the 1990s picked up by the late 2000s, this was largely concentrated in the extractives sector (Brown, 2013). The recent relaxation of sanctions and political change have led to both the Burmese government and foreign investors seeking to significantly increase

⁹ The Burmese government operates a system of export quotas to control trade and incentivise the production of certain agricultural products, such as oil palm. As these are distributed erratically and can be withdrawn arbitrarily, they do not offer much security to producers (Ash Center, 2011). In addition, export quotas for oil seeds are mainly given to large agribusinesses that have been awarded land but are not able to fulfil production targets (BEWG, 2011).

¹⁰ Virgin and fallow land is an official category of land in Burma. There is no information on the start date of the period covered.

¹¹ This figure is assumed to include the 1.38 million has provided in the 2012 report.



investment across economic sectors.

- This sought after increase in investment is happening at a time where demand for primary commodities, including minerals and agricultural products, is high. While most natural gas – Burma's largest export – is exported to Thailand, exports of timber and agricultural products to China are growing rapidly, especially for vegetable oils, biofuels, and rice (MIT, 2013; Ash Center, 2011). Burma's Southeast Asian neighbours largely opened up to foreign investment and trade in periods when prices and international demand for commodities were lower.
- Burma's political parties in opposition enjoy strong international links and considerable domestic support. Recent political changes in Burma have also lifted restrictions on civil society groups, allowing Burmese and international NGOs to associate and operate much more freely than in recent years. The strong possibility of a change in leadership to a new democratically elected government after 2015 separates Burma from post-socialist Vietnam and Laos, where rulers have retained power for much longer.
- Burma faces pressure to create a federal government structure, with power divided among the ethnic groups who represent the majority of the population in each state. While political movements led by ethnic groups who demand greater autonomy exist in other Southeast Asian countries, they are much weaker than groups in Burma, which can credibly threaten to destabilise peace and security. Along with other implications (e.g. tax, political representation) federalism may lead to multiple systems of land governance across Burma (e.g. incorporating parts of customary law).
- The Government of Burma aims to roll out a rapid large-scale titling programme that its current land administration does not have the capacity to support. Although other Southeast Asian countries have undertaken ambitious land-titling programmes in recent decades (Thailand, Vietnam, Laos), these have included longer preparation phases and took longer to complete than the present timetable outlined by the Burmese government.



SECTION 2

The legal and policy framework for land

The legal framework for land in Burma is made up of at least 73 active laws, amendments, orders and regulations passed under different governments that overlap, conflict and do not refer to preceding laws (USAID, 2013).

Following independence in 1948, the 1953 Land Nationalisation Act gave legal authority to the state to claim all land and redistribute it in line with socialist principles. While recognising certain private rights over agricultural land, it prohibited land sales and transfer between citizens. Since then, various additions to the legal framework have swung between strengthening farmers' rights to land and legitimising state expropriation and reallocation of land. However, the 1953 Land Nationalisation Act remained the main reference point for land governance up to 2012 and (like in many former socialist countries) the state has remained the ultimate owner of all land and the sole entity authorised to lease it.

The Land Nationalisation Act also gave the state the legal right to expropriate land categorised as 'fallow'. Although this provision is meant to discourage absentee landlords and exploitative tenancy arrangements, in practice it has also facilitated acquisition of land by the state even where land was under use by farmers.

In 1991 the government introduced a law to allow expropriation and reallocation of land categorised as 'wasteland', a category covering land without a title (the Wasteland Law). This marked a policy change towards favouring large private and public companies, as the main beneficiaries of reallocation were companies closely affiliated to the military, including state-owned enterprises, joint ventures and private corporations. Although in theory smallholders could apply to access wasteland, the government did not make any small-scale allocations on the grounds that farmers lacked the capital to develop this land effectively (Obendorf, 2012). A central committee was created to assess applications for land, and grant use rights.¹² First-time applicants could receive up to 5,000 acres (2,023 hectares) of land for industrial crops which, if developed, could be expanded up to 50,000 acres for a period of up to 30 years. Although the committee reserved the right to take back unused land, this has not yet happened in practice.

Development of wasteland has been heavily promoted in agricultural policy (Chao, 2013). Application for wasteland by foreign-owned companies was prohibited in theory, although foreign companies could create joint-ventures with local enterprises and agents to access land (BEWG, 2011).

Changes to the legal and policy framework

In 2012, the government adopted two new laws – the Vacant, Fallow and Virgin Lands Management Law (VFW Law) and the Farmland Law – and repealed a number of existing statutes (Displacement Solutions, 2012). The new laws set out the processes for management of the two overarching categories of land most relevant to farmers: farmland,

¹² The full name of this committee is the Central Committee for the Management of Cultivable Land, Fallow Land and Waste Land.

and Vacant Fallow and Virgin (VfV) land. The implications of the new land laws on land use, registration and transfer of land are presented in Table 1.

Issue	Before 2012 Land Laws	After 2012 Land Laws
Land use		
Cropping decisions on land categorised as farmland	Farmers can only grow crops on land designated for that use, as defined by the land category.	Unchanged.
Fallowing of farmland	Not permitted without a sound reason.	Unchanged.
Farmers' use of land categorised as wasteland/VfV land	Farmers' use of these land categories not recognised at all in land laws.	Farmer's use of these land categories recognised but rights to land are dependent on successful application of a land use certificate.
Land managed under <i>taungya</i> (shifting) cultivation	No legal recognition of <i>taungya</i> as a widespread land use.	<i>Taungya</i> is recognised as a common land use but still liable for expropriation as time limits for fallowing are not defined.
Ability to register and transfer land		
Registration of farmland	Few farmers have land certificates. In conflict-affected areas this is less than 25%. It is not clear that these provide <i>de facto</i> protection from expropriation.	All legitimate land users are legally required to register their land and receive documentation.
Sales and other transfer of land categorised as farmland	Land sales by farmers officially prohibited, but often occurred in practice, especially among indebted households.	Sales and transfers of farmland allowed, but only by persons with land use rights, i.e. land certificates.
Sales of non-titled land (Wasteland)	Only the government can expropriate and reallocate wasteland. Farmers can reputedly benefit from land reallocation but do not in practice.	Unchanged.


Table 1 Situation for farmers' land use before and after the 2012 Farmland Law and VfV Land Law

The Farmland Law

The Farmland Law replaces existing laws governing the management of land categorised as farmland.¹³ It reaffirms accepted definitions and categories of land use, and importantly recognises land under *taungya* cultivation as a category. It created a new body – the Farmland Management Body (FMB) – which is replicated through government offices down to the village administration, replacing existing land committees. Most land administration functions are devolved to these bodies, with the central FMB providing 'guidance and control' on key issues, including disputes, transfer of rights, *taungya* and land registration.

Most significantly, the Farmland Law allows for the development of a formal land market, granting private rights to farmers to sell, exchange, inherit, donate and lease land (ibid). To engage in land markets, however, farmers must apply for land use certificates through the local level FMB. Land use certificates are issued upon approval of district FMBs and the payment of fees. Nevertheless, the State Land Records Department (SLRD), the

¹³ It replaces the 1953 Land Nationalisation Act, among others.



government agency responsible for setting up the infrastructure for issuing and administering land use certificates, is currently understaffed and has very low capacity to fulfil its responsibilities (Landesa, 2013; Jewell, 2013).

The Vacant, Fallow and Virgin Lands Management Law (VFW Law)

The VFW Law effectively replaced previous laws governing land categorised as ‘culturable’ [sic], ‘fallow’ and ‘wasteland’, and continued many of the provisions of the Wasteland Law. It also brought the management of these land categories into a single legal framework under a new Central Committee for the Management of VFV Land, a multi-ministerial committee formed at the president’s discretion. The VFW Law prohibits landholders from transferring land without cabinet approval, and lays out rules on how these lands are to be managed by the state. The new law breaks from the previous framework by recognising that farmers cultivate large areas of land categorised as VFV, and it provides a means for them to obtain land use certificates for this land by applying to the central committee.

As well as institutions within the Ministry of Agriculture and Irrigation, several intra-governmental and ministerial committees have been created to oversee specific issues, including land classification, land tenure insecurity, and land conflict (USAID, 2013):

- **The Land Allotment and Utilisation Scrutiny Committee** operates at the cabinet level under the leadership of the Ministry of Environmental Conservation and Forestry, and is charged with designing national land-use policy, submitting proposals for administrative land-use plans following assessment of resource requirements, identifying land available for resettlement of households residing on VFV lands, and allocating land for investment purposes.
- **The Land Acquisition Inquiry Commission** is a cross-party parliamentary body mandated to investigate land disputes over the last 20 years, and whether confiscation has been carried out in compliance with the law. Although it holds potential for redressing land grievances from the military confiscation of land, it has no power to resolve disputes or provide compensation, as its role is limited to informing parliamentary initiatives (Obendorf, 2012).

What implications do these changes in the legal and policy framework have for tenure security of land holders? Box 2 highlights ambiguities and gaps, as well as the absence of impartial dispute resolution and judicial channels, which present challenges and limit the scope for a landholder to challenge or receive compensation for expropriation of their land.

Box 2 Views on how Burma’s new land laws affect landholders’ security of tenure

Because the Farmland and VFW Laws are new, there is little evidence of their direct impact as yet. While some observers feel that the laws represent a step forward in providing stronger rights for farmers (Landesa, 2013), others have highlighted the risks that these laws present for the tenure security of many farmers who cultivate land that is categorised as vacant or fallow, or whose farming practices are not recognised (Obendorf, 2012). Some commentators (e.g. *ibid*; BEWG, 2011; Landesa, 2013; USAID, 2013) believe that gaps in the recent laws will mean that farmers are no better off, and even less well protected under the current laws than previously for the following reasons:

- The laws potentially compound existing support for large-scale farming by explicitly referencing the Foreign Investment Law in sections related to the identification of land for investment. Areas of overlap between the laws also provide the possibility for discretion in how they are applied, creating scope for benefiting vested interests (DFID & FCO, 2013). Although farmers are in theory eligible to apply for land, their

rights are not prioritised above applications from agribusiness.

- The drive to register land and provide certificates, which is meant to strengthen farmers' security of tenure, is not coupled with awareness-raising campaigns to inform farmers of their rights and obligations. If farmers fail to register land, they may become more exposed to the risk of eviction. At the village and village tract level, the lack of guidance on how information is collected and how land use certificates are issued open up possible dangers for local-level land grabbing and corruption, the impact of which could be as damaging as large-scale land grabbing (DFID & FCO, 2013).
- The government can still restrict what crops farmers grow, and can confiscate land if farmers grow crops that are not categorised as 'regular'. For instance, farmers cannot grow other crops on land categorised for rice cultivation without permission from the government, risking confiscation of land if they do so.
- Although the Farmland Law recognises land for *taungya* as a land use, the definition of *taungya* provided by Ministry of Agriculture bylaws contrarily describes it as land that is under permanent cultivation. Because the laws provide no indication of the time length that land under shifting cultivation may legitimately be fallowed, the recognition of *taungya* in the Farmland Law offers little in the way of security against expropriation.
- Even if farmers hold certificates, land holdings can be expropriated relatively easily by the state with no compensation.
- The laws do not update legislation covering the grounds for expropriation, process, and payment of compensation. The relevant law for this, the 1894 Land Acquisition Act, is not suited to current land use and governance. Burma's land governance framework still lacks a methodology to determine how much compensation should be paid and an independent body to administer the process (Displacement Solutions, 2012).
- The main institution for resolving farmland disputes is the village-level FMB, even for cases made against FMB decisions. Appeals can be made up to the state-level FMB, but there is no provision for appeal to the judiciary (Obendorf, 2012).
- The process of passing the law has been criticised by observers (Displacement Solutions, 2012). While there was some consultation and public discussion of the law before it was adopted, the transparency and haste of the process, coupled with the lack of debate, have been viewed as inadequate and undermining the rule of law (ibid).
- The laws do not acknowledge or legitimise common customary and informal practices for governing and transferring land. Households also rely on informal practices to access and transfer land. Customary rights for ethnic minorities in border states are legally recognised for marriage, inheritance and succession, but are not recognised for land-use practices (BEWG, 2011).



SECTION 3

Donor engagement in Burma's land sector

Burma's opening up in the aftermath of Cyclone Nargis provided a window of opportunity for donors to begin influencing land governance in Burma. The Burmese government has signalled a strong interest in receiving assistance from international experts in key areas across the executive, legislative and judicial branches of government (DLA Piper, 2013). A UN HABITAT mission to Burma in December 2011 marked the first time that the government had invited the UN to provide assistance on land issues (Displacement Solutions, 2012), and subsequent visits by the FAO and international groups working on land rights indicate the government's willingness to engage international views and expertise on land. Although Myanmar did not participate in the negotiation of, and has not formally adopted the Voluntary Guidelines on Governance of Tenure, the government has received technical briefings on the them and signalled an interested in receiving more assistance for awareness raising (FAO, 2013; Krebber, *personal communication*).

At the same time, donors need to approach engaging the government on land issues cautiously. As described above, political actors, including the present government, are increasingly taking stances on land issues to strengthen their political base and there is therefore a risk that donor-funded land programmes attract political interference and controversy. While the present government is undertaking reforms in the land sector, it is so far unclear how far key actors are willing to go and if reforms will curb land grabbing.

There exists a high risk of inadvertently doing harm by supporting poorly thought-through government initiatives (e.g. rushed titling); donors have may have limited scope to monitor and influence these initiatives once underway, given the limited communication channels with government departments. There is, therefore, a strong rationale to make efforts to raise landholders' awareness of their rights and the ways in which they can realise them.

Possible areas of intervention

Donors can potentially contribute to the following areas:

- **Law:** some of the laws enacted under British rule remained unchanged during the period of military rule, despite changes in patterns of land use and land acquisition. The new 2012 laws have been criticised for failing to resolve weaknesses in previous legislation and for not adequately protecting all land users (see Box 2). Overlaps between different pieces of legislation still need to be resolved, but changes require parliamentary approval. Farmers' groups and CSOs which see the existing legal framework as inadequate are lobbying for changes to strengthen protection for smallholder farmers.
- **Land policy:** Burma lacks a unifying land policy document that sets out the priorities for its land sector, and how these link to policy priorities in other sectors. There is no official guidance on how discrepancies are to be resolved between the Investment Act – which encourages land use for large-scale farming – and protecting the rights of existing land users.

- **Dispute resolution mechanisms:** Under the present laws, FMBs under the Ministry of Agriculture and Irrigation are responsible for resolving disputes and there are no provisions for appealing land disputes through the judicial system.
- **Awareness of land laws and rights:** Awareness of land laws is low among the Burmese population. The government has not prioritised information campaigns on recent changes to land laws, and many farmers' groups have little knowledge of their land rights. In addition, some officials in the government and opposition are not fully aware of the potential implications of changes to the law (Landesa, 2013).
- **Administrative capacity:** Powers of land administration are devolved to local government institutions under new land laws. These institutions are poorly staffed and their capacity to administer land is weak, especially for undertaking increased administrative tasks associated with a large-scale titling scheme.

Existing programmes and entry points for donor activities


Several entry points for donors to provide support exist. Working groups chaired by the government tasked with resolving pressing land-related issues present an opportunity to provide technical expertise and expand dialogue on land issues with senior government leaders. UN HABITAT, USAID and the EU are currently funding technical assistance programmes to assist committees to address these issues.

At the working level of government departments within the Ministries of Agriculture and Forestry, donor programmes offering technical support can help government staff to carry out their functions, and use new technology and modern land administration tools. This can influence processes and help the government to avoid mistakes as they embark on large-scale titling, as well as highlight where practices can be improved.

Recent political changes have also relaxed constraints on civil society's freedom to associate, and allowed national and international NGOs to expand their activities (Jackson, *personal communication*). The Livelihood and Food Security Trust Fund, a multi-donor trust fund set up to rebuild livelihoods after Cyclone Nargis, funds research on land issues (e.g. customary tenure, land taxation and contract farming) and awareness-raising campaigns on land issues with farmers and lawyers. The Core Land Group of the Food Security Working Group – a body made up of local and international NGOs and donors – provides a forum to discuss and coordinate civil society positions on land, to fund research to better understand the land issues that farmers face, and to lobby government. With support from Namati, an international paralegal network, a local organisation called the Civil and Political Rights Campaign group is supporting 30 local paralegals to spread knowledge of land laws in villages and helping households to register their land. Information collected during this campaign will be used by these groups to lobby government for systematic improvements in land policy (Namati, *personal communication*). Broadening support for civil society groups to further research and raise the profile of land issues with the public and government is likely to raise demand for better land governance.

Several other areas of donor action may contribute to preventing the displacement of households, improve conditions for farmers, and strengthen land governance at the national level:

- Build greater understanding of land reform experiences in other Southeast Asian countries among government leaders and the opposition. Land-reform processes in Cambodia and Vietnam, both former socialist states that share agro-climatic conditions with Burma, are relevant examples of how land reform can be managed well or poorly. These may serve as important models for Burmese officials, as they offer highly tangible lessons of how to build a market economy and undertake titling while



protecting the land rights of the majority of rural households (Displacement Solutions, 2012; FAO, 2012). Experiences from other Asian countries, such as Taiwan and China, that have built successful modern economies based on smallholder farming models instead of plantations, also serve as useful illustrations (Landesa, 2013). Organising study tours and education sessions on land policy and administration for political leaders and government officials is likely to be a low-risk and potentially effective way of creating a vision for Burma's land sector.

- Fund and support legal aid programmes to help evictees access courts and legal representation. This is likely to provide an effective means to help strengthen farmers' claims to land, and build awareness on the Land Laws. While funding these types of programmes may be seen as antagonistic by parts of government and raise risks of poor relationships for donors, maintaining an arms-length relationship with programme management and stressing the non-political nature of funding may offer some protection.
- Provide assistance to farmers' groups to negotiate with foreign investors directly. In some areas, investors (especially from China) are approaching individuals and groups of farmers to lease land. Building the capacity of local groups to negotiate terms directly with investors may provide more direct benefits than working through government institutions. ActionAid has trialled this approach with some success, which could be replicated across other parts of the country (Kerr, *personal communication*).
- Influence home-country investment policy guidelines. Where donors can influence home-country investors to adopt voluntary codes of conduct, undertake due diligence, and screen risks for potential dispossession and human rights violations, this may be effective in mitigating detrimental effects. There may be an opportunity to provide information and training on risks related to land investment to investors together with wider information on the investment climate and other issues investors may face (labour laws, practices and arbitration).¹⁴ Service providers such as Burma-based chambers of commerce and legal advisory firms could be approached to deliver training.
- Building regional understanding of good governance in land tenure. As most foreign investors in Burma are from Asia, finding ways to build interest in land governance issues in these countries through dialogue with officials and raising awareness of poor practices by companies within civil society in these countries may be an effective means of making companies more aware and responsive to the risks of violating tenure rights.

¹⁴ For example, foreign investors should be aware that Burma has not fully implemented any international dispute mechanisms, although its decision to accede to the New York Convention on 15 July 2013 is a step in the right direction (Kerr, *personal communication*).



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Annex 1 Administrative Map of Burma



Annex 2 Map of Myanmar with population density by Township



(Source: Myanmar Information Management Unit, 2013)